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CITATIONS

624541—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 606

CITY OF FRESNO, PETITIONER

v.

STATE OF CALIFORNIA, UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND H. P. DUGAN, EDWIN F. SULLIVAN, AND JAMES M. INGLES IN OPPOSITION

OPINIONS BELOW

The opinion and supplemental opinion of the district court are reported *sub nom. Rank* v. *Krug* (*United States*) at 142 F. Supp. 1–198. The opinion of the court of appeals (Pet. App. 1–45) and its opinion denying the City of Fresno's petition for rehearing (Pet. App. 50–52) are reported *sub nom. California* v. *Rank* at 293 F. 2d 340.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1961 (Pet. App. 46–47). The City of Fresno's petition for rehearing was denied on Au-

gust 14, 1961 (Pet. App. 48–49). On November 3, 1961, Mr. Justice Douglas extended the time for the City of Fresno to file a petition for a writ of certiorari to December 12, 1961. The petition was filed on December 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a municipal user's claim of a right to purchase water from a federal reclamation project at the same rates as those charged to irrigation users may be asserted in a suit against subordinate officials of the Bureau of Reclamation.

2. Whether Congress has consented to the prosecution against the United States of the type of suit in which such a claim was made in this case.

3. Whether there is any merit to such a claim, in view of the valid federal policy of subsidizing the sale of project water for irrigation purposes.

STATUTES INVOLVED

Section 208(a) of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, provides:

> (a) Joinder of United States as defendant; costs.
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States

is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons.

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State.

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

Section 9(c) of the Reclamation Project Act of August 4, 1939, 53 Stat. 1193, as amended, 43 U.S.C. 485h(c), provides in relevant part:

The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract, either (1) shall require repayment to the United States, over a period of not to exceed forty years from the year in which water is first delivered for the

use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an appropriate share as determined by the Secretary of that part of the construction costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year. Any sale of electric power or lease of power privileges, made by the Secretary in connection with the operation of any project or division of a project, shall be for such periods, not to exceed forty years, and at such rates as in his judgment will produce power revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost, interest on an appropriate share of the construction investment at not less than 3 per centum per annum, and such other fixed charges as the Secretary deems proper * * *.

STATEMENT

This is, in the words of the court below (Pet. App. 24), a "special phase" of a case in which another petition for certiorari, filed by the Solicitor General on behalf of certain local officials of the Bureau of Reclamation of the Department of the Interior, is pending in this Court, *Dugan* v. *Rank*,

No. 366, this Term.[1] This suit (the background and nature of which are more fully described at pp. 3–4 of our petition in No. 366) was instituted by a number of users of water from the San Joaquin River to enjoin the aforesaid Bureau of Reclamation officials (the individual respondents herein) from interfering, by means of the Bureau-administered Central Valley Project, with their water rights, or to obtain a "physical solution" that would provide them with water to meet their needs. Subsequently the United States (over its objection that it was immune from suit) was joined as a necessary party defendant, and the City of Fresno (petitioner herein) intervened as a party plaintiff.

On the main issues litigated in the district court—the merit and justiciability of the claims of riparian and overlying users of San Joaquin River water *vis-à-vis* the Central Valley Project—petitioner here stood in essentially the same position as the other plaintiffs. It participated in the litigation of those issues; it received the benefit of the district court's decision in favor of the plaintiffs and of the court of appeals' affirmance thereof; and when the Bureau of Reclamation officials sought a writ of certiorari in No. 366 to test the decisions of the courts below on the central issues presented by this proceeding, petitioner here was named as a respondent and has joined in the filing of a brief in opposition.

However, in addition to these main issues, petitioner here raised an essentially unrelated question in the

[1] The Court was requested to hold that petition in abeyance until the court below had disposed of petitions for rehearing that are still pending before it.

district court. Under the project plan of the Central Valley Project, "project water" is delivered to irrigation districts and other public entities pursuant to contracts providing for appropriate payment, and petitioner desired to obtain such water for municipal purposes to supplement its existing water supply. Accordingly, in the trial court it claimed (and sought a judicial declaration of) a right to contract to receive such water at a price of $3.50 per acre-foot, the amount charged for water delivered for irrigation purposes. The Department of the Interior considered $10 per acre-foot to be the appropriate charge for water delivered for municipal purposes. The difference arose from the fact that, while for irrigation purposes the price charged does not include interest on the investment in facilities (see *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295), Section 9(c) of the Reclamation Project Act of August 4, 1939, 53 Stat. 1193, as amended, 43 U.S.C. 485h(c) (see pp. 3–4, *supra*), permits the Secretary of the Interior to include interest in determining the amount to be paid under contracts "to furnish water for municipal water supply or miscellaneous purposes * * *."

The district court declared that the City of Fresno had a right to an additional water supply superior to any right of the United States to divert water, through the Central Valley Project, beyond the watershed or county of origin; that Fresno had not as yet constructed any works by which it could receive project water; and that (142 F. Supp. at 185):

> If, as, and when the City of Fresno is in a position to take and receive the water, it will then be sufficient time to enforce that right by an

> appropriate decree under the provisions of Section 2202 of Title 28 United States Code.

As to the rate claim, without mentioning the statute relied upon by the Secretary of the Interior, the district court held (*ibid.*):

> The City of Fresno is entitled to a declaratory judgment that any charge for water which may be made by the United States should be reasonable. Reasonableness, in light of the facts and the Federal Reclamation Act and the Statutes of California, requires that such charges should be no more than the Irrigation Districts are charged from time to time for Class I water.

The court of appeals reversed and directed that the judgment "be vacated and set aside insofar as it relates to the terms upon which the City of Fresno is entitled to receive water from the United States at Friant Dam" (Pet. App. 45). As we have discussed at pp. 5–6 of our petition in No. 366, the court held that this suit could not be maintained against the United States, because it had not consented to such a suit. On the main issues of the case, it held that a suit to enforce the plaintiffs' water rights could be maintained against individual officials of the Bureau of Reclamation on the ground that their conduct of the Central Valley Project constituted a trespass upon those rights that had not been authorized by Congress. However, with respect to the separate claim of petitioner herein to a right to contract for water at a certain rate, the court reasoned (Pet. App. 25–26):

> In negotiating and contracting for the delivery of water from Friant Dam, defendant officials were acting within the scope of their statutory authority and were carrying out the duties imposed upon them by their official positions. It is their administrative function to determine the rates at which water shall be delivered. It cannot be said that their statutory authority is limited to the making of such determination as the courts may find to be reasonable. The complaint of Fresno in this regard is a complaint against the United States and this dispute may not be entertained judicially without a waiver of sovereign immunity on the part of the United States.

With respect to the district court's conclusion that Fresno had water rights superior to those of the United States, the court below found it unnecessary to decide that question because, in any event

> Fresno has * * * no vested right to command the services of the United States in receiving its waters. The terms upon which the United States is willing to act in this respect remain an administrative decision which it is within the authority of the defendant officials to make.

(Pet. App. 26–27; see also opinion on rehearing, Pet. App. 51–52). The City's timely petition for rehearing was denied on August 14, 1961 (Pet. App. 49, 51–52).[2]

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[2] As petitioner notes (Pet. 38, n. 25), a contract for project water has recently been executed between the City and the United States. It provides, *inter alia:*

ARGUMENT

The government's petition for a writ of certiorari in *Dugan* v. *Rank*, No. 366, this Term, presents important questions concerning (1) the relationship between the judicial and executive branches of the federal government, (2) the federal power of eminent domain, and (3) the sovereign immunity of the United States, all of which should be reviewed by this Court. However, the issues presented by the present petition are completely separable from the questions in No. 366. They were correctly decided by the court below and are not of sufficient importance to warrant further review.[3]

1. The court below was plainly correct in holding that petitioner's claims could not be asserted in a suit against the United States or against the respondent officials of the Bureau of Reclamation without the government's consent to be sued. In claiming a right to receive water at a price of $3.50 per acre foot, petitioner

12. (a) Nothing in this contract shall be construed as affecting the rights of the parties to or concerned in that certain action entitled (*State of California, United States of America, et al.* v. *Rank, et al.* (No. 15840) now on appeal in the Circuit Court of the United States in and for the Ninth Circuit.

(b) In the event any of the provisions of this contract shall be contrary to any issue as finally decreed in said *State of California, United States of America, et al.* v. *Rank, et al.*, then this agreement shall be amended to comply with the said final decree: *Provided, however,* That in any event the City shall be entitled to the amount of water specified in Article 3 hereof or such amount as may be decreed in *State of California, United States of America, et al.* v. *Rank, et al.*, whichever amount is the larger.

[3] The reason for holding No. 366 in abeyance, see note 1, *supra*, does not apply to the instant petition, nor does petitioner so contend.

has never contended that the respondent officials were acting beyond their statutory authority in refusing to contract at such a rate; as the court below held (Pet. App. 25–26), there cannot be any serious question as to the discretion they have been granted in that regard. Moreover, it is perfectly plain that to vindicate the right to contract claimed by petitioner would require the respondent officials to take affirmative action in their governmental capacity.[4] Thus the sole grounds on which the court below distinguished such cases as *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, in holding the respondent officials amenable to suit for alleged interferences with the plaintiffs' water rights, are clearly inapplicable to petitioner's claim of a right to contract. Of course, sovereign immunity cannot be evaded by couching relief sought in terms of a declaration of a right to enter into a contract containing certain provisions, rather than by directing a mandatory injunction to compel the government officer to contract on those terms. *Love* v. *United States*, 108 F. 2d 43, 50 (C.A. 8); *Anderson* v. *United States*, 229 F. 2d 675 (C.A. 5); cf. *Blackmar* v. *Guerre*, 342 U.S. 512, 515–516.[5]

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[4] Similarly, since affirmative action would be required of the Secretary of the Interior, who is the officer empowered by statute to execute such contracts, 48 U.S.C. 485(h)(c) (see pp. 3–4, *supra*), the limitation the court below made of the rule of *Williams* v. *Fanning*, 332 U.S. 490 (Pet. App. 28)—*i.e.*, "that a superior officer is indispensable only if the relief granted will require him to take affirmative action"—is of no help to petitioner.

[5] It is petitioner's position, as expressed in its petition for rehearing in the court below (pp. 44–46), that the court could

2. Petitioner also contends that the United States had actually consented to this suit, by virtue of 43 U.S.C. 666 (see pp. 2–3, *supra*). The court below was manifestly correct in concluding upon a careful analysis of the legislative history and of the law of western waters to which the statute related, that in none of its aspects was the suit involved in this case the type of suit for a general adjudication of water rights contemplated by 43 U.S.C. 666 (Pet. App. 12–17). See *Miller* v. *Jennings*, 243 F. 2d 157 (C.A. 5), certiorari denied, 355 U.S. 827.

3. Moreover, even if petitioner's claim could be asserted against the United States or its individual officials, it is wholly lacking in merit. In enacting the Reclamation Project Act of 1939, Congress clearly contemplated that higher rates for project water could be charged to municipal and industrial users than those charged for irrigation purposes. As this Court noted in *Ivanhoe Irr. Dist.* v. *McCracken*, 357 U.S. 275, 295, interest is not taken into account in fixing rates for irrigation water, so that the supplying of project water for such purposes involves a "subsidy." See also *Swigart* v. *Baker*, 229 U.S. 187, 197. However, the Reclamation Project Act expressly authorizes the Secretary of the Interior to include interest when fixing the price at which municipalities might secure project water. Under the circumstances, it is clear that there can be no right to obtain water for municipal purposes at the same rate charged for irrigation

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"grant affirmative relief as part of its injunctive process by ordering the defendant Bureau of Reclamation officials to execute the customary contract therefor."

purposes. Nor is such a distinction in any way unreasonable. As this Court observed in the *Ivanhoe* case, *supra,* 357 U.S. at 295, "beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges." In view of the prime purpose of the reclamation legislation to promote irrigation, it was entirely proper for Congress to conclude that a given amount of subsidy should be conferred upon water used for irrigation, while a lesser amount or none at all should be conferred upon water for municipal, industrial or power purposes.*

4. The district court recognized that the City of Fresno had not constructed any works to bring a supplemental supply of San Joaquin water to it and its decree "declared" that when the City should do so, the respondent officials would be enjoined from diverting water until the City's prior rights were satisfied (142 F. Supp. at 185). Petitioner's claim of preferred water rights over anyone who would divert water beyond the watershed or county of origin (see p. 6, *supra*) thus presents a purely academic question at the present time and, as the court of appeals said in denying rehearing, that academic claim is unrelated to petitioner's other claim of a right to contract for project water at the irrigator's price (Pet. App. 52). Since the Declaratory Judgment Act may not be used as a medium for securing an advisory opinion, *Coff-*

* The line of cases cited in the petition (Pet. 29), relating to judicial review of rates in the framework of a comprehensive scheme of economic regulation of privately owned enterprises is, of course, irrelevant.

man v. *Breeze Corporations,* 323 U.S. 316, 324, the court of appeals was plainly right in saying that this claim of the City involves "speculation upon future events and future issues and decision must await the occurrence and the dispute" (Pet. App. 52).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1962.

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